

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

HEDRICK MEDICAL CENTER
Respondent

and

Case 17-CA-21982-2

NURSES UNITED FOR
IMPROVED PATIENT CARE,
Charging Party

David A. Nixon, Esq.
for the General Counsel.

Kimberly Seten, Esq.
Kerri S. Reisdorff, Esq.
Robert J. Janowitz, Esq.
Constangy, Brooks & Smith, LLC
Kansas City, Missouri, for the Respondent.

DECISION

I. Statement of the Case

Thomas M. Patton, Administrative Law Judge. A hearing was held in this case in Overland Park, Kansas, on January 14-15, 2003. The charge was filed by Nurses United for Improved Patient Care (the Union) on November 20, 2002, and served the following day. The hearing was held on a consolidated complaint in cases 17-CA-21954 and 17-CA-21982, alleging violations by Hedrick Medical Center (Hedrick or Respondent) and several other employers. The alleged violations by Hedrick were severed for decision by an order issued October 24, 2003. The alleged violations by the other employers in cases 17-CA-21954 and 17-CA-21982 will be the subject of a separate decision. All of the employers are represented by the same attorneys. A separate appearance was entered on behalf of Hedrick and Hedrick filed a separate brief. A brief was filed by the General Counsel. The case number of this severed case is redesignated Case 17-CA-21982-2.

II. Findings of Fact

A. Jurisdiction

Hedrick is engaged in the operation of a health care facility located in Chillicothe, Missouri (the Hospital). The Respondent admits and I find that the Respondent meets the Board's standards for asserting jurisdiction and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. The labor organization

5 The Respondent admits and I find that Nurses United for Improved Patient Care (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

C. The alleged unfair labor practices

10 The complaint, as amended at the hearing, alleges that Hedrick violated Section 8(a)(1) of the Act by maintaining, during the six month period prior to the filing and service of the charge, rules that interfere with, restrain and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rules at issue are in the following document (the Policy) that Hedrick concededly promulgated on February 14, 1998, and since that date has maintained:

15 Management Guidebook
HEDRICK MEDICAL CENTER
100 Central Street
Chillicothe, MO 64601

Guideline# :B-32
Issue Date :03/14/97
Revision Date :02/12/98
Page :1 of 2

SOLICITATIONS/BULLETIN BOARD USE

20
25 PURPOSE: To clearly define Hedrick Medical Center's policy regarding all types of solicitation and use of bulletin boards within buildings used by the Medical Center,

In an effort to protect employees and non-employees who utilize Hedrick Medical Center facilities and services, guidelines regarding solicitations and bulletin board use must be established and monitored.

Solicitations

30
35 Non-Employee Solicitations- All solicitations of employees, patients, and visitors by non-employees are prohibited. Anyone entering HMC facilities to make a solicitation must be immediately directed to the Director of Human Resources or to the Administration office. All telephone solicitations shall be directed in the same manner,

40 •Employee Solicitations - All solicitations by employees are restricted to non-working areas during non-work times, i.e. lunch or coffee breaks or other specified periods during the workday when employees are not properly engaged in performing their work tasks. These should never occur with patients or families or in patient care areas. Mailboxes are not to be used for any type of solicitation.

45 •Donation Requests - All internal and external requests for financial donations should be directed to Administration.

50 •Distribution of Literatur - Any proposed distribution of literature should be reviewed with the Human Resources Department.

•HMC Solicitations - Periodically, NMC may make available to employees information regarding community based solicitations such as Auxiliary

functions, blood drives, American Heart or Cancer Assoc. information, etc. Employee participation is strictly voluntary with no expectations by the medical center of mandated involvement by the employee.

5

Bulletin Board Use

10

Bulletin boards within Hedrick Medical Center facilities are reserved for business use and personal postings are prohibited. No materials should be placed on any bulletin board without approval by the management person responsible for that particular board. All materials placed on public bulletin boards must be approved by the Director of Human Resources or a member of Administration. All postings to department or public bulletin boards must be initialed and dated by the appropriate management representative or the HR Director before being posted.

15

A separate bulletin board for employee items will be available to post items for sale or trade by the individual employee (not businesses). These should be posted on 3x5 cards and must be approved by Human Resources before posting. These will be posted for a specific period of time, then removed.

20

Submitted by [signature]Pat Houston
Approved by [signature]Lynn Jackson

Date 2-13-98
Date 2-14-98

25

There is no evidence that Hedrick ever affirmatively invoked or enforced the Policy in response to Section 7 activity by any employee or in response to solicitation by a nonemployee union representative. Thus, what is at issue is the maintenance of the rules contained in the Policy.

30

It is evident that the Policy is for the guidance of managers and supervisors. There is no direct evidence that the document was disseminated to employees. Nevertheless, I infer that employees were made aware of the terms of the Policy. The Policy has been in effect for over five years and it regulates the conduct of employees relating to solicitation, distribution and bulletin board use. To achieve the stated objectives of the Policy, it is reasonable to conclude that employees were made aware of the directives. This is especially so because there has been no contention and there is no evidence that Hedrick attempted or intended to restrict knowledge of the Policy to management.

35

40

An inference is not warranted that the Policy was made known to nonemployees. There is no evidence that signs or notices were posted advising the public of the prohibition of solicitation by nonemployees.

45

The complaint does not specify which provisions of the Policy interfere with employee rights. The nonemployee solicitation rule, the employee solicitation rule, the distribution rule and the bulletin board rules will be addressed. There has been no contention and the evidence does not establish that other rules contained in the Policy violate the Act. There has been no contention that the provisions of the non-employee solicitation rule regarding incoming telephone solicitations and directing employees to refer solicitors calling or entering the Hospital to management are independently unlawful and they will not be separately discussed.

50

C. Analysis

1. Nonemployee solicitation rule

5 The General Counsel contends that Hedrick violated Section 8(a)(1) by maintaining a rule prohibiting nonemployee solicitation. The General Counsel argues that based upon *Bristol Farms*, 311 NLRB 437 (1993); *Indio Grocery Outlet*, 323 NLRB 1138 (1997); and *Food for Less*, 318 NLRB 646 (1995), Hedrick had a burden, which it did not carry, to prove that it had a
10 sufficient property interest under state law to maintain the rule. The General Counsel does not acknowledge or address any arguable distinctions between the present case and the cited cases.

15 Hedrick contends that an employer may lawfully prohibit nonemployee union organizers access to its property for solicitation purposes, absent a showing that on-site employees are otherwise inaccessible through reasonable efforts, citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 534 (1992); and *Intercommunity Hospital*, 255 NLRB 468, 469-470 (1981). Hedrick asserts that the General Counsel made no
20 showing that Hedrick's employees are inaccessible and that the Policy's language regarding non-employee solicitations is accordingly lawful. Hedrick does not address the contention made by the General Counsel at the hearing that Hedrick had a burden to prove that it had a sufficient property interest to maintain the rule.

25 The record does not provide details regarding the physical facility, staffing or operations of the Hospital. On brief the Respondent represents that the Hospital is an acute care hospital. There is no evidence regarding rules or practices regarding who is permitted to enter the Hospital. There is no evidence that the Respondent does not have exclusive possession and control of the buildings where the Policy is applicable. There is no evidence that discloses whether there are grounds, sidewalks, parking lots, bus stops or other ancillary facilities outside
30 the Hospital buildings that Hedrick claims to control. There is no evidence that Hospital employees are inaccessible off-site through reasonable efforts. There is no evidence that Hedrick discriminates against the union by permitting other nonemployees to solicit. There is no evidence regarding Hedrick's property rights under Missouri law that would privilege it to deny access by nonemployee union solicitors.

35 In *Wild Oats Markets*, 336 NLRB No. 14, slip op. at 2 (2001), the Board stated:

40 It is well established that an employer may properly prohibit solicitation/distribution by nonemployee union representatives on its property if reasonable efforts by the union through other available channels of communication will enable it to convey its message, and if the employer's prohibition does not discriminate against the union by permitting others to solicit/distribute. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). This precedent, however,
45 presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from that property. Therefore, in situations involving a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with a denial of union access to its property must meet a threshold burden of establishing that it had, at
50 the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act. See *Indio Grocery*

Outlet, 323 NLRB 1138, 1141-1142 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000); *Food For Less*, [318 NLRB 646, 649-650 (1995)]; *Bristol Farms, Inc.*, 311 NLRB 437, 438-439 (1993). In determining the character of an employer's property interest, the Board examines relevant record evidence-- including the language of a lease or other pertinent agreement--in conjunction with the law of the state in which the property is located. See *Food For Less*, supra, at 649.

If Hedrick has a burden to prove that it had a sufficient property interest under Missouri law to maintain the rule on nonemployee solicitation, a violation is proven, since Hedrick introduced no evidence of such a property interest. Conversely, if the General Counsel has not established that the burden is on Hedrick to prove that that maintenance of the rule was privileged under Missouri law, there is no violation because the rule would be privileged under *Lechmere*, since there is no evidence that Hedrick discriminatorily applied the rule or that there are not other legally sufficient channels of communication available to nonemployee union representatives.

Trespassing on private property is unlawful in all states. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 286 (1993). An employer may validly post its property against nonemployee union activity. *Lechmere*, 502 U.S. at 538; *Babcock & Wilcox*, , 351 U.S. at 112. The Board has never found that the mere maintenance of a facially neutral rule excluding nonemployee solicitors from an employer's property violates the Act.

In the post-*Lechmere* decisions involving the right to exclude nonemployee union representatives, individuals have actually been excluded and there were objective circumstances that presented a purported or asserted conflict between the exercise of Section 7 rights and private property rights. In such circumstances the Board has imposed a burden on employers to prove their property rights are superior under state law. *Wild Oats*, supra; *Corporate Interiors, Inc.*, 340 NLRB No. 85 (2003); *A&E Food Co. 1*, 339 NLRB No. 104 (2003); *Wolgast Corp.*, 334 NLRB No. 31 (2001); *Snyder's of Hanover, Inc.*, 334 NLRB No. 21 (2001); *Farm Fresh, Inc.*, supra. Where a violation is found, the remedy ordered is tailored to the particular circumstances.

The Board decisions where the employer was found to have a burden to prove its exclusory property rights under state law involved areas such as sidewalks, shopping malls, entrance areas, parking lots, bus stops, common situs projects and other locations that had characteristics of a public place. An employer's exclusory right in such circumstances may be limited by leases, contracts, easements, laws and court decisions. The determinations of the employers' exclusory rights by the Board were highly fact specific, involving specific locations and circumstances. In contrast, the burden the General Counsel urges be imposed in this case would require an employer to defend its facially neutral rule excluding nonemployee solicitors in a multitude of hypothetical situations.

The General Counsel contends, in substance, that there is a rebuttable presumption that an employer who maintains a facially neutral rule excluding nonemployee solicitors from employer property, without more, violates Section 8(a)(1). This result is not dictated by *Wild Oats Markets* and similar cases. The Board has not imposed a burden on employers to prove an exclusory right based on state law in the absence of evidence of an actual exclusion, coupled with a purported conflict between Section 7 rights and private property rights. The contention of the General Counsel raises significant legal issues and fundamental policy issues. No convincing argument has been advanced in support of the contention. I accordingly

conclude that a violation regarding the nonemployee solicitation rule, on the record in this case, has not been proven.¹

5

2. Employee solicitation rule

The rule in the Policy regarding employee solicitation unambiguously prohibits solicitation by employees except in non-working areas during non-work times. The restriction, by its terms, applies to Section 7 activity. While the rule goes on to emphasize that solicitations should never occur in patient care areas, employees would not reasonably believe that the restriction was limited to patient care areas.

A hospital may prohibit all solicitation in immediate patient areas. In areas other than immediate patient areas solicitation during non-work time must be allowed, unless there is a showing by the employer of disruption to patient care. *Beth-Israel Hospital v. NLRB*, 437 U.S. 483 (1978). This is an exception to the general proposition that employer rules prohibiting employee solicitation during work time are presumptively valid, whereas rules prohibiting or otherwise restricting solicitation during non-work time are presumptively invalid. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1954). Hedrick has made no showing that employee solicitation in areas other than immediate patient areas would disrupt patient care. Accordingly, the rule violates Section 8(a)(1).

3. Distribution rule

The rule in the Policy regarding the distribution of literature requires prior review by the Respondent. The distribution of literature by the employees of a hospital during non-working time and in nonworking areas is protected Section 7 activity. See *Brockton Hospital*, 333 NLRB No. 165, (2001); *St. John's Hospital*, 222 NLRB 1150-1151 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977); *Eastern Maine Medical Center*, 253 NLRB 224, 225-226 (1980), enfd. 658 F.2d 1 (1st Cir. 1981). The rule, by its terms, applies to Section 7 activity.

A requirement that employees submit literature for review prior to distribution protected by Section 7 is unlawful. See *Brunswick Corp.*, 282 NLRB 794 (1987); *Harrah's Lake Tahoe Resort Casino*, 307 NLRB 182 (1992). Accordingly, the rule violates Section 8(a)(1).

35

4. Bulletin board rules

Hedrick has two types of bulletin boards. One type is reserved for business use and employees are prohibited from using these bulletin boards. There is no evidence that the prohibition on employee use of these bulletin boards has not been enforced or that there has been discrimination affecting Section 7 rights in the regulation of these bulletin boards. In general, there is no statutory right of employees or a union to use an employer's bulletin board. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d (8th Cir. 1983). Accordingly, I conclude that there was no violation regarding the bulletin boards reserved for business use.

45

¹ While not relied on in reaching my conclusion regarding the nonemployee solicitation rule, Hedrick may have a presumptive right to exclude nonemployee union representatives from the interior of the Hospital without reference to state law. See *Tri-County Medical Center*, 222 NLRB 1089 (1976). The record does not show that the challenged rule is applicable to any identified locations outside the Hospital buildings.

50

The second type of bulletin board addressed by the Policy is a separate bulletin board for employee use. The rule limits this bulletin board to the posting of items for nonbusiness sale or trade by individual employees. The postings are limited to a 3x5 cards and must be approved by management before posting. There is no evidence that the restriction on employee use of these bulletin boards has not been enforced or that there has been discrimination affecting Section 7 rights in the regulation of these bulletin boards.

When an employer furnishes a bulletin board for employee postings, the general rule is that it may not impose content-based restrictions that discriminate between posting of Section 7 matters and other postings. However, when the employer maintains a rule regarding permissible posting on company bulletin boards and enforces it strictly and not discriminatorily, the rule may stand and no violation occurs. *Whirlpool Corp.*, 337 NLRB No. 117 (2002). See *Vons Grocery Co.*, 320 NLRB 53 (1995). I conclude that the evidence does not establish a violation regarding the employee bulletin board reserved for the sale or trade of personal items.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining a policy prohibiting soliciting by employees during non-work time in areas other than immediate patient areas the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By maintaining a policy requiring employees to submit literature for review prior to distribution the Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not otherwise violated the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Maintaining a policy prohibiting soliciting by employees during non-work time in areas other than immediate patient areas.

(b) Maintaining a policy requiring employees to submit literature for review prior to distribution.

(c) In any like or related manner interfering with, restraining or coercing employees at the facility located in Chillicothe, Missouri, in the exercise of rights guaranteed them by section 7 of the Act.

2. Take the following affirmative actions, which are necessary to effectuate the policies of the Act:

(a) Withdraw Guideline B-32 with a revision date of February 12, 1998, of the Hedrick Medical Center Management Guidebook, insofar as it prohibits soliciting by employees during non-work time in areas other than immediate patient areas and requires employees to submit literature for review prior to distribution.

(b) Within 14 days after service by the Region, post at its Chillicothe, Missouri facilities copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, while these proceedings are pending, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 2002.

5 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

10

Dated, San Francisco, California, October 29, 2003.

15

20

25

Thomas M. Patton
Administrative Law Judge

30

35

40

45

50

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL WITHDRAW the provisions of the Hedrick Medical Center Management Guidebook that prohibits soliciting by our employees during non-work time in areas other than immediate patient areas and that requires employees to submit literature for review by management before it is distributed.

WE WILL NOT ENFORCE against our employees the provisions of the Hedrick Medical Center Management Guidebook that prohibits soliciting by our employees during non-work time in areas other than immediate patient areas and that requires employees to submit literature for review by management before it is distributed.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

HEDRICK MEDICAL CENTER

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677
(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.